

CITY OF PORTSMOUTH

LEGAL DEPARTMENT

MEMORANDUM

DATE: MARCH 16, 2023

TO: PETER STITH, PLANNING MANAGER
STEFANIE CASELLA, PLANNER

FROM: TREVOR P. MCCOURT, ASSISTANT CITY ATTORNEY *TPM*

RE: ZONING BOARD OF ADJUSTMENT JURISDICTION
APPEALS FROM THE PLANNING BOARD

The following memorandum provides an overview of the Zoning Board of Adjustment's (BOA) jurisdiction over appeals from the Planning Board, and is provided in response to a request from the Planning Manager to this Department in light of such an appeal.

If an applicant or other person with standing seeks to challenge a decision of the Planning Board, the general rule is that appeals must be timely filed in Superior Court. RSA 676:5, III, which appears below, provides a narrow exception for appeals which must first be taken to the BOA. Those appeals must involve a decision or determination of the Planning Board which "is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance". The statute further directs appeals involving innovative land use controls, including conditional use permits, directly to Superior Court.

Therefore, only questions involving the "construction, interpretation, or application of the zoning ordinance" are properly within the BOA's jurisdiction, and any claims outside of those parameters should be dismissed.

RSA 676:5, III states as follows:

If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant

to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.

cc: Susan Morrell, City Attorney
Peter Britz, Director of Planning and Sustainability

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

NORTH MILL POND HOLDINGS LLC, et al.

v.

CITY OF PORTSMOUTH

Docket No.: 218-2022-CV-00093

ORDER ON PENDING MOTIONS

Petitioners North Mill Pond Holdings LLC and One Raynes Ave LLC (“Petitioners”) appeal a January 27, 2022 decision by the Planning Board (the “Board”) for Defendant City of Portsmouth (the “City”). See Docs. 1 (Compl.), 7 (Am. Compl.) (also seeking declaratory relief). Petitioners now move for summary judgment. Docs. 16 (Pets.’ Mot. Summ. J.); 17 (Pets.’ Mem. Law). A group of City residents (the “Intervenors”) object. Docs. 35 (Intervenors’ Obj.); 36 (Intervenors’ Mem. Law).¹ The Court held a hearing on Petitioners’ motion on December 21, 2022, at which time the City orally joined in the Intervenors’ objection. After the hearing, the Intervenors moved to dismiss the Petition as moot. See Docs. 43 (Intervenors’ Mot. Dismiss); 44 (Intervenors’ Mem. Law); see also Doc. 47 (Pets.’ Obj.); Doc. 48 (Intervenors’ Response to Doc. 47); Doc. 50 (City’s Limited Response to Doc. 43) (indicating the City does not join in or assent to the Intervenors’ Motion to Dismiss). For the reasons that follow, the Intervenors’ Motion to Dismiss is **DENIED**, and Petitioners’ Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**.

¹ At the hearing, the Court struck as untimely the Intervenors’ December 21, 2022 “Supplemental Memorandum,” see Doc. 42, and on that basis does not consider it herein.

Background

The relevant facts are not in dispute. See Doc. 37 (Statement of Material Facts). A more detailed account of the facts underlying this case was set forth in the Court's Order denying the City's Motion to Dismiss, see Doc. 14 (Order, August 10, 2022), and need not be fully restated here. On December 16, 2021, the Board held a public hearing on and ultimately granted Petitioners' application for Site Plan Review Approval, a Wetlands Conditional Use Permit, and a parking Conditional Use Permit. See Doc. 37 ¶¶ 5–7. On January 14, 2022, the Intervenor filed a Motion for Rehearing/ Reconsideration. See id. ¶ 10; Doc. 17 Ex. 2; C.R. at 113–21. Also on January 14, 2022, the Intervenor filed an "Appeal of Decision of Portsmouth Planning Board" with the City's Zoning Board of Adjustment (the "ZBA"). See Docs. 37 ¶ 11; 17, Ex. 3.

On January 27, 2022, the Board voted (5-4) to grant the motion for rehearing. See Doc. 37 ¶¶ 19, 23; C.R. at 222. On February 9, 2022, Petitioners brought this appeal, arguing, inter alia, the Board improperly granted the Intervenor's motion for rehearing, so that decision should be voided. See Docs. 1, 7. On February 15, 2022, the Court (Wageling, J.) granted certiorari and ordered that "[p]roceedings upon the decision appealed from are stayed." Doc. 3. As far as the Court can discern from the record before it, the ZBA took no action on the Intervenor's appeal before the Court stayed those proceedings.

Analysis

I. Intervenor's Motion to Dismiss

The Intervenor argues that Petitioners' claims should be dismissed as moot. See Doc. 44. The Intervenor argues that when the Board initially granted Petitioners'

application, the site plan approval and conditional use permits would expire after one year unless Petitioners obtained a building permit or an extension of time to obtain one. See id. Because Petitioners failed to do so, the Intervenor maintain that reinstating the Board’s December 16, 2021 approval by way of voiding its decision to rehear the application would have no legal effect. See id. Accordingly, the Intervenor argue that Petitioners’ appeal of the Board’s decision to grant a rehearing is moot. See id.

“Generally . . . a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead.” In re Juvenile 2005–212, 154 N.H. 763, 765 (2007). “A petition for declaratory judgment becomes moot when any event occurs after the petition is filed which terminates the adverse claim.” Real Estate Planners, Inc. v. Town of Newmarket, 134 N.H. 696, 701 (1991).

As Petitioners correctly point out, the February 15, 2022 Certiorari Order from this Court provided, among other things, that “[p]roceedings upon the decision appealed from are stayed.” Doc. 46 ¶¶ 9–10 (quoting Doc. 3). In the Court’s view, the February 15, 2022 stay of proceedings applied to the tolling of Petitioners’ one-year window for obtaining a building permit.² In light of this conclusion, the issues presented in the Petition are not “academic or dead.” See In re Juvenile 2005–212, 154 N.H. at 765. Accordingly, Intervenor’s Motion to Dismiss the Petition as moot is **DENIED**.

II. Petitioners’ Motion for Summary Judgment

In their Petition and in their motion for summary judgment, Petitioners argue that the Board erred in granting the Intervenor’s Motion for Rehearing by “(1) asserting jurisdiction over a motion for rehearing after its decision had been appealed to the ZBA

² Notably, the Intervenor have cited no authority which might undermine the Court’s conclusion that the stay applied to Petitioners’ window for obtaining a building permit.

[in violation of RSA 676:6]; and (2) granting a rehearing more than 30 days after its initial decision.” See Doc. 17 at 5–6. Petitioners further contend that they are entitled to summary judgment as to their claim that the ZBA lacked jurisdiction over the Intervenor’s appeal. See id. at 8–12 (arguing that the issues appealed to the ZBA do not involve the interpretation of zoning ordinances or are statutorily excluded from the ZBA’s purview).

For their part, the Intervenor’s argue that the filing of their ZBA appeal did not divest the Board of jurisdiction to correct its own errors. See Doc. 36 at 8–10. In particular, the Intervenor’s contend that the purpose of RSA 676:6 is to “maintain the status quo,” which, in this case, would be preventing Petitioners from engaging in construction while an appeal is pending. Id. The Intervenor’s further argue that “[t]he thirty-day period is the period within which the Intervenor’s were required to file their motion, not the period within which the Planning Board was required to act on it.” Id. at 4–5 (citing RSA 677:2–3, which govern appeals of a ZBA decision to the Superior Court and motions for rehearing before the ZBA).

“Jurisdiction of the courts to review procedural aspects of planning board decisions and actions shall be limited to consideration of compliance with applicable provisions of the constitution, statutes and regulations.” RSA 676:4, IV. “When reviewing a planning board decision, the trial court must determine on the record before it whether the decision is unreasonable or erroneous as a matter of law.” Route 12 Books & Video v. Town of Troy, 149 N.H. 569, 574 (2003) (citation omitted). Where, as here, a party moves for summary judgment in connection with the Court’s review of a planning board decision, the typical standard governing such motions applies: i.e.,

summary judgment shall be granted where “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III. In ruling on such a motion, the Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. See Stewart v. Bader, 154 N.H. 75, 85 (2006).

In this case, the inquiry before the Court is whether, and if so to what extent, the Board had the authority to grant the Intervenors’ request for rehearing under the circumstances described above. “Cities and towns have only such powers as the State grants them.” 74 Cox St., LLC v. City of Nashua, 146 N.H. 228, 231 (2007) (cleaned up). In 74 Cox St., the Supreme Court considered whether a zoning board of adjustment had the authority to reconsider its prior denial of a request for rehearing. See id. Although the 74 Cox St. court recognized that “RSA 677 does not set out any procedure by which a ZBA may reconsider a decision to deny rehearing,” the court concluded that “when the legislature authorized the ZBA to grant or deny requests for rehearing . . . that statutory grant included the authority to reconsider decisions to deny rehearing . . . during the time period allotted by statute for parties to appeal those same decisions.” Id. Notably, however, the 74 Cox St. court clarified that “the ZBA was entitled to exercise its inherent power to reconsider its decision only during the statutory appeal period.” Id. at 233 (emphasis added).

Although there is no statute or rule expressly providing a planning board with the authority to rehear an application, see RSA 677:3 (providing for rehearings by boards of adjustment), the Court concludes (and Petitioners do not dispute) that planning boards have some inherent authority to reconsider their own decisions. See 74 Cox St., 146

N.H. at 231. However, similar to the Supreme Court’s reasoning in 74 Cox St., the Court concludes that a planning board is only entitled to reconsider its decision during the statutory appeal period associated with that decision.

As Petitioners point out, “[t]he deadline for filing an appeal of a planning board decision [to the Superior Court] is thirty days from the ‘date upon which the Board voted to approve or disapprove the application.’” Id. (quoting RSA 677:15). However, under RSA 676:5, I, “[a]ppeals to the board of adjustment concerning any matter within the board’s powers as set forth in RSA 674:33 may be taken by any person aggrieved . . . within a reasonable time.” Thus, consistent with the reasoning set forth in 74 Cox St., planning boards have the inherent authority to reconsider decisions appealable to the Superior Court within thirty days, and inherent authority to reconsider decisions appealable to the ZBA “within a reasonable time.” Cf. Route 12 Books & Video, 149 N.H. at 576 (“When a party is aggrieved by a planning board decision that interprets both planning regulations and zoning ordinances and wishes to appeal issues involving both, the party is obligated to file separate appeals with the superior court and zoning board of adjustment.” Id. at 576.

In this case, the parties disagree as to which aspects (if any) of the Board’s December 16, 2021 decision were appealable to the ZBA. Upon review, the Court concludes that it need not (and should not) resolve that dispute at this time. To the extent any of the issues the Intervenors raised were directly appealable to this Court, the Board could not grant a rehearing in connection with those issues after January 15,

2022.³ Thus, to the extent the Board’s January 27, 2022 decision to grant a rehearing was predicated on issues which could have been (but were not) directly appealed to this Court, that decision was legally erroneous. See 74 Cox St., 146 N.H. at 231; RSA 677:15 (providing 30 days to appeal certain decisions by a planning board to the Superior Court); Route 12 Books & Video, 149 N.H. at 574 (“When reviewing a planning board decision, the trial court must determine on the record before it whether the decision is unreasonable or erroneous as a matter of law.”).

To the extent the Board’s January 27, 2022 decision was predicated on issues which were appropriately appealed to the ZBA, the Board’s decision to grant the Intervenor’s request for a rehearing was also legally erroneous. As previously noted, by the time the Board granted the Intervenor’s request for a rehearing, the Intervenor had already appealed the Board’s December 16, 2021 decision to the ZBA. Under RSA 676:6, which is entitled “Effect of Appeal to the Board,” “[a]n appeal of any order or other enforcement action shall stay all proceedings under the action appealed from unless the officer from whom the appeal is taken certifies . . . that . . . a stay would . . . cause imminent peril to life, health, safety, property, or the environment.” RSA 676:6. The Intervenor does not contend that such a risk is present here, and the Court cannot discern one from the record. Accordingly, to the extent the Intervenor’s request for rehearing was predicated on issues which were appropriately appealed to the ZBA, the Court concludes that the Intervenor’s filing of such an appeal deprived the Board of

³ The Court notes the record reflects that the Board also understood that it had thirty days to decide whether to grant the request for rehearing, but erroneously determined that it granted Petitioner’s application on December 30, 2021, when it actually granted the application on December 16, 2021. See C.R. at 221 (discussing that the rehearing decision should be made within thirty days of the original decision and stating that the decision was made on December 30, 2021); but see id. at 104–09 (granting Petitioner’s Conditional Use Permits and Site Plan approval at the Board’s December 16, 2021 meeting).

jurisdiction. See id.

In summary, the Court concludes that the Board did not timely grant rehearing on any grounds which were appealable to the Superior Court, and the Board lacked jurisdiction to grant rehearing on any grounds which the Intervenors appropriately appealed to the ZBA. In either case, the Board's decision to grant the Intervenors' request for rehearing was erroneous as a matter of law. See Route 12 Books & Video, 149 N.H. at 574. In light of the foregoing, the Court need not reach the other grounds upon which Petitioners argue that the Board's decision to grant rehearing was improper. See Canty v. Hopkins, 146 N.H. 151, 156 (2001). Rather, for the reasons outlined above, Petitioners' motion for summary judgment is **GRANTED** with respect to their claim that the Board committed an error of law in granting the Intervenors' rehearing request. As a result, the Board's decision is hereby **VACATED**.

Notably, Petitioners also seek summary judgment with respect to their request for declaratory relief as to the aforementioned dispute regarding which aspects of the Board's December 16, 2021 decision were appropriately appealed to the ZBA. See Doc. 17 at 8–12. As set forth above, the thirty-day window in which the Intervenors' could have filed an appeal concerning matters which were directly appealable to the Superior Court lapsed on January 16, 2022. As such, any such issues are not preserved for further review. Nevertheless, the Court declines to determine, at this juncture, which issues (if any) the Intervenors appropriately appealed to the ZBA. See Pederson v. Brook, 151 N.H. 65, 69 (2004) (remanding to permit the lower court to apply the proper legal standard in the first instance). In the Court's view, the ZBA should, in the first instance, determine whether it has jurisdiction over the issues raised

in the Intervenors' January 14, 2022 appeal. Accordingly, Petitioners' Motion for Summary Judgment is **DENIED** as to its claim for declaratory relief regarding the ZBA's jurisdiction. Further, the Court's February 15, 2022 Stay is **LIFTED** so that the ZBA can determine, in the first instance, whether it has jurisdiction over the issues presented in the Intervenors' appeal.

III. Attorney's Fees

As a final matter, Petitioners seek an award of attorney's fees as to their appeal and declaratory judgment action, see Doc. 7 at 23, and as to their response to the Intervenors' Motion to Dismiss, see Doc. 46 ¶ 20. The Intervenors' object. See Docs. 27 (Ans.), 48 (Intervenors' Reply to Pet.'s Obj. Mot. Dismiss). While the City joined in most of the Intervenors' positions in this case, see Doc. 21, the City expressly did not join in or assent to the Intervenors' Motion to Dismiss, see Doc. 50.

"Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate." Harkeen v. Adams, 117 N.H. 687, 691 (1997). Given the complex procedural nature of this case, the Court cannot conclude that a general award of attorney's fees is appropriate. However, the Court concludes that Petitioners are entitled to reasonable attorney's fees incurred in connection with their response to the Intervenors' Motion to Dismiss. The Court's Certiorari Order unambiguously stayed proceedings from the Board's decision granting the rehearing, see Doc. 3, and the Intervenors have failed to provide a good faith basis through which the Court could reach a different result. See Doc. 44; see also Doc. 48. As the City did not join in that motion, such fees shall only

be assessed against the Intervenors. Petitioners' request for attorney's fees is thus **GRANTED IN PART** and **DENIED IN PART**.

CONCLUSION

Consistent with the foregoing, the Intervenors' Motion to Dismiss is **DENIED**. The Board's January 27, 2022 decision granting the Intervenors' Motion for Rehearing/ Reconsideration is **VACATED**. The Court's February 15, 2022 Order staying proceedings below is **LIFTED**, so that the ZBA can determine, in the first instance, whether it has jurisdiction over the issues presented in the Intervenors' January 14, 2022 appeal.

Petitioners' request for reasonable attorney's fees is **GRANTED** as to fees incurred in connection with the Intervenors' Motion to Dismiss (such fees to be assessed only against the Intervenors) but is otherwise **DENIED**. Within ten (10) days of the date on the Clerk's notice of decision accompanying this Order, Petitioners shall file a schedule of their costs and reasonable attorneys' fees accrued in connection with the Intervenors' Motion to Dismiss, see Doc. 43. The Intervenors will thereafter be afforded ten (10) days in which to respond.

SO ORDERED.

Date: February 2, 2023

Clerk's Notice of Decision
Document Sent to Parties
on 02/02/2023



Hon. Daniel I. St. Hilaire
Presiding Justice

SHEEHAN PHINNEY

Boston • Concord • Manchester • Portsmouth • Upper Valley

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1000 Elm Street, 17th Floor
P. O. Box 3701
Manchester, NH 03105-3701

January 25, 2022

Via Hand Delivery

Peter Stith, Principal Planner
Zoning Board of Adjustment of the City of Portsmouth
1 Junkins Ave., 3rd Floor
Portsmouth, NH 03801

Re: In re Application of North Mill Pond Holdings, LLC, One Raynes Ave, LLC, 31 Raynes Ave, LLC, and 203 Maplewood Ave, LLC, regarding the properties located at 1 Raynes Avenue, 203 Maplewood Avenue, and 31 Raynes Avenue, and known familiarly as The Raynes Avenue Project

Dear Mr. Stith:

Enclosed for filing in the above-referenced matter, please find 11 copies of Applicants North Mill Pond Holdings, LLC, One Raynes Ave, LLC, 31 Raynes Ave, LLC, and 203 Maplewood Ave, LLC's Motion To Dismiss Appeal Of Decision Of Portsmouth Planning Board.

I thank you for your attention to this matter.

Very truly yours,

/s/ Brian J. Bouchard

Brian J. Bouchard

Enclosure

THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

In re Application of North Mill Pond Holdings, LLC, One Raynes Ave, LLC, 31 Raynes Ave, LLC, and 203 Maplewood Ave, LLC, regarding the properties located at 1 Raynes Avenue, 203 Maplewood Avenue, and 31 Raynes Avenue, and known familiarly as The Raynes Avenue Project

MOTION TO DISMISS APPEAL OF DECISION OF PORTSMOUTH PLANNING BOARD

Applicants North Mill Pond Holdings, LLC, One Raynes Ave, LLC, 31 Raynes Ave, LLC, and 203 Maplewood Ave, LLC move to dismiss Appellants' Appeal of Decision of Portsmouth Planning Board for the following reason:

This Board lacks jurisdiction over Appellants' appeal because none of Appellants' claims involve the interpretation or application of the zoning ordinance other than the Wetlands Condition Use Permit, and the Board lacks jurisdiction over the Wetlands CUP claim.

THE ZBA'S JURISDICTION

Appellants admit, as they must, that their appeal is taken pursuant to RSA 676:5, III. RSA 676:5, III states as follows:

If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.

Thus, this Board's jurisdiction over an appeal of a Planning Board decision is limited to "*any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance.*" RSA 676:5, III also

expressly excludes the Planning Board's grant of a conditional use permit from the appellate jurisdiction of the ZBA.

APPELLANTS' CLAIMS

Appellants' appeal raises only the following claims:

1. An ineligible member of the Planning Board participated in the Planning Board proceeding.
2. The Planning Board erred when it granted the Wetlands Conditional Use permit;
3. The Planning Board made other "unrelated" errors, including: (a) failing to wait until the Historic District Commission acted on the application; and (b) leaving unanswered questions relating to paying for and enforcing a valet parking condition;
4. The Planning Board chairman misquoted the Conservation Law Foundation's opinion about the impact on the wetlands buffer zone and North Mill Pond; and
5. The Planning Board failed to adopt the Conservation Commission's failure to recommend approval of the project.

NONE OF APPELLANTS' CLAIMS INVOLVES INTERPRETATION OR APPLICATION OF THE ZONING ORDINANCE OTHER THAN THE WETLANDS CUP

None of Appellants' claims involves interpretation or application of the zoning ordinance other than the Wetlands CUP. In fact, the only provisions of the zoning ordinance mentioned in the appeal are 10.1017.50 (criteria for approval of Wetlands CUP), 10.1017.41 (conditions for approval of Wetlands CUP), and 10.1017.60 (installation of utilities in wetland – Appellants agree is inapplicable). There are no other zoning provisions cited in Appellants' appeal.

No other zoning ordinance provisions are cited because none of the claims involves the zoning ordinance other than the Wetlands CUP. Issue (1) involves the composition of the Planning Board which is a matter of state law and Portsmouth's Administrative Code. There is no zoning provision that requires Historic District Commission approval of this development prior to Planning Board approval as alleged in issue (3). The "unanswered questions" in issue (3) do not invoke the zoning ordinance. There is no zoning provision that requires the Planning

Board to adopt the Conservation Commission’s recommendation, which relates only to the Wetlands CUP, as alleged in issue (5).

The two remaining claims invoke only the Wetlands CUP. Issue (2) argues only that the Planning Board erred when it granted the Wetlands CUP. Issue (4) argues that the CLF was misquoted, and the CLF’s letter plainly states that the comments were made when “the [Planning] Board considered a conditional use permit (CUP) to allow the proposed 1&31 Raynes Avenue project to be built within the 100-foot wetlands buffer.”

THE BOARD LACKS JURISDICTION OVER THE APPEAL

The Board lacks jurisdiction over claims (1), (3), and (5) enumerated above because none of the claims involves “*any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance.*” RSA 676:5, III. The Board lacks jurisdiction over claims (2), (4), and (5) enumerated above because those claims involve a conditional use permit over which the Planning Board has exclusive jurisdiction. RSA 676:5, III.

Because the Board lacks jurisdiction over Appellants’ claims, the appeal must be dismissed.

WHEREFORE, North Mill Pond Holdings, LLC, One Raynes Ave, LLC, 31 Raynes Ave, LLC, and 203 Maplewood Ave, LLC respectfully request that the Portsmouth Zoning Board of Adjustment dismiss Appellants’ Appeal of Decision of Portsmouth Planning Board.

Respectfully submitted,

NORTH MILL POND HOLDINGS LLC,
ONE RAYNES AVE, LLC,
31 RAYNES AVE, LLC, and
203 MAPLEWOOD AVE, LLC

By their counsel,

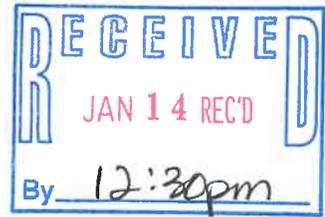
Dated: January 25, 2022

By /s/ Michael D. Ramsdell
Michael D. Ramsdell (Bar No. 2096)
Brian J. Bouchard (Bar No. 20913)
Sheehan Phinney Bass & Green, P.A.
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CERTIFICATE OF SERVICE

On January 25, 2022, this Motion to Dismiss Appeal of Decision of Portsmouth Planning Board was forwarded via email to Portsmouth City Attorney Robert P. Sullivan and Duncan J. MacCallum, Esq.

By: /s/ Michael D. Ramsdell
Michael D. Ramsdell



THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

**In re Application of North Mill Pond Holdings, LLC,
One Raynes Ave, LLC, 31 Raynes Ave, LLC, and
203 Maplewood Ave, LLC, regarding the properties
located at 1 Raynes Avenue, 203 Maplewood Avenue,
and 31 Raynes Avenue, and known familiarly as**

The Raynes Avenue Project

APPEAL OF DECISION OF
PORTSMOUTH PLANNING BOARD

Pursuant to RSA 676:5, III, James A. Beal, Fintan (“Finn”) Connell, Joseph R. Famularo, Jr., Philippe Favet, Charlotte Gindele, Julia Gindele, Linda Griebisch, Catherine L. (“Kate”) Harris, Roy W. Helsel, Elizabeth Jefferson, and Donna Pantelakos (collectively referred-to hereinafter as “the appellants”), all of whom are citizens, residents and/or property owners in the City of Portsmouth, hereby appeal the December 16, 2021 decision of the Portsmouth Planning Board, in which said Board (a) granted site plan approval to the owner-applicants’ above-referenced project, which is proposed to be prosecuted at their adjoining properties located at 1 Raynes Avenue, 31 Raynes Avenue, and 203 Maplewood Avenue; (b) granted a wetlands conditional use permit to the owner-applicants for that purpose; and (c) granted certain other, miscellaneous approvals, including an approval relating to valet parking. The movants ask that the Zoning Board of Adjustment reverse the Planning Board’s decision, rescind the wetlands

conditional use permit which has been granted, and enter a new decision disapproving the applicants' site plan.

STANDARD OF REVIEW OF PLANNING BOARD DECISIONS

The legal standard for review of Planning Board decisions by the Zoning Board of Adjustment is de novo. Ouellette v. Town of Kingston, 157 N.H. 604, 608-12, 956 A.2d 286, 290-93 (2008); 15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 33.02 n.10 (4th ed. 2010 & Supp. 2020). This Zoning Board of Adjustment is required to consider the applicants' petitions anew, and the ZBA is not required to give any deference to any of the findings and conclusions reached by the Planning Board. Id. In fact, this Board (viz., the ZBA) may substitute its own judgment in toto for that of the Planning Board, if it is so inclined. Id.

GROUND FOR APPEAL

The appellants assign the following, specific grounds for their appeal, consisting of ways in which the Planning Board misconstrued, misinterpreted, misapplied, or, in some instances, altogether failed to observe and follow the provisions of the Portsmouth Zoning Ordinance:

1. An ineligible member of the Planning Board, who was improperly appointed to that Board, participated in consideration of the applicants' site plan review and voted to approve it. Therefore, under the teachings of the New Hampshire Supreme Court's decision in Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), the Planning Board's decision granting site plan approval, issuing a wetlands conditional use permit, and granting other approvals is absolutely void. In the Winslow case, the court ruled that the participation of a single ineligible member in a land use board's decision invalidates the entire decision because "it

[is] impossible to estimate the influence one member might have on his associates”. 125 N.H. at 268, 480 A.2d at 117. More particularly:

2. Planning Board member Raymond Pezzullo was and is ineligible to sit on the Planning Board because he was improperly appointed pursuant to a provision in Portsmouth’s local Administrative Code which directly conflicts with a New Hampshire state statute. Therefore, the local Administrative Code provision is void.

3. More specifically, RSA 673: 2 provides that in cities having a city manager form of local government, the planning board is to consist of nine members, two of whom are to be ex officio members and the other seven of whom are to be appointed by the mayor and confirmed by the city council. Of the two ex officio members, one is to be the city manager or someone whom he or she chooses to appoint to serve in his or her place, and the other is to be a member of the city council, selected by the city council itself. By contrast, section 1.303 of Portsmouth’s local Administrative Code, pursuant to which Mr. Pezzullo was ostensibly appointed, conflicts with this statutory scheme, in that it purports to authorize the city manager to appoint a third Planning Board member, selected from the City administrative staff, as an ex officio member, increasing the number of ex officio members from two to three and decreasing the number of Planning Board members appointed by the mayor and confirmed by the City Council from seven to six. RSA 673:2 neither provides for nor permits the appointment of a third ex officio member. Therefore, section 1.303 of the City’s Administrative Code is in direct conflict with statutory scheme established by RSA 673:2 and is therefore void, and Mr. Pezzullo’s appointment to the Planning Board was unlawful. (The conflict between the state statute and local Administrative Code is explained more fully in a letter dated December 1, 2021 from Planning Board member Rick Chellman to City Attorney Robert P. Sullivan, a copy of which is appended hereto as

Attachment A, and in a subsequent letter dated December 29, 2021 from the movants' undersigned counsel to former Planning Board Chairman Dexter Legg, a copy of which is appended hereto as Attachment B.)

4. Mr. Pezzullo's participation in the December 16, 2021 decision was especially egregious, for his lack of eligibility to sit on the Planning Board was timely called to the Board's attention by another member of the Planning Board itself, Rick Chellman, at the start of the meeting on that date. Mr. Chellman had previously written a letter to City Attorney Bob Sullivan on December 1, 2021, raising the issue and explaining why Mr. Pezzullo's appointment violated state law (see Attachment A hereto), and he re-raised it verbally with the chairman and the other Planning Board members at the start of the December 16, 2021 meeting. However, his protests were ignored.

5. In addition to violating state law, Portsmouth's method of selecting a third ex officio member also creates an obvious conflict of interest on the part of the appointee. As noted above, section 1.303 of Portsmouth's Administrative Code provides that the third ex officio member is appointed by the city manager and selected from the City's administrative staff. As a member of the city administration, the appointee is a city employee and thus is beholden to the city manager for his job; she has the power of hiring and firing over the former. Under such circumstances, the appointee will be loath to publicly express an opinion that is contrary to the opinion, stance, or wishes of the city manager, and he is not likely to vote against an application or measure that she supports. Almost invariably, he will vote in favor of whatever she votes for, and he will vote against whatever she votes against. In this situation, there is no chance that the appointee in question will ever exercise independent judgment. The practical effect of section 1.303 is that the city manager gets two votes on the Planning Board--her own, and the vote of the ex officio

member whom she has appointed from the City's administrative staff--whereas the regular members appointed by the mayor and confirmed by the City Council get only one.

6. Finally, Mr. Pezzullo's purported membership on the Planning Board did not even comply with the Administrative Code itself, for as an ex officio member his term of office was to have expired at the time of the retirement of the appointing authority who had appointed him, which was former City Manager John Bohenko. Following City Manager Bohenko's retirement two years ago, Mr. Pezzullo was never reappointed by the current city manager nor confirmed by the City Council. (For further discussion, see Attachments A and B hereto.) He has simply continued to sit after his term of office as an ex officio member had ended. Under any scenario, therefore, he has been sitting on the Planning Board unlawfully.

7. For all of the foregoing reasons, Mr. Pezzullo was ineligible to sit on the Planning Board; he was appointed to that Board unlawfully; and under the teachings of Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), the Planning Board's decision of December 16, 2021 was absolutely void. For that reason, this Board should reconsider its decision and conduct a full rehearing on the developers' application.

8. Several of the members of the Planning Board who voted to grant site plan approval and, in particular, who voted to grant a wetlands conditional use permit employed palpably erroneous legal reasoning and committed clear legal error in applying section 10.1017.50 of the Zoning Ordinance, which sets forth the six criteria for the granting of wetlands conditional use permits. These six criteria are mandatory, yet four of the members of the Planning Board, including its chairman, openly expressed the view that these six criteria were merely "factors" to be weighed against one another and that the criteria were "negotiable". The vice-chairwoman flatly--and totally erroneously--stated that an applicant does not necessarily have to meet all six

of the criteria in order to qualify for a wetlands conditional use permit. The chairman at one point opined that the six criteria are “open to interpretation”. Two other members made similar comments evincing an extremely cavalier attitude toward the six criteria.

9. All of this constituted clear and obvious legal error. The criteria for the granting of a conditional use permit are indeed mandatory, and the applicants’ proposal did not satisfy at least two of those criteria. Section 10.1017.50 of the Zoning Ordinance sets forth the six criteria which must be met in order for a wetlands conditional use permit to be issued. They are:

(1) The land is reasonably suited to the **use**, activity or **alteration**.

(2) There is no alternative location outside the **wetland buffer** that is feasible and reasonable for the proposed **use**, activity or **alteration**.

(3) There will be no adverse impact on the **wetland** functional values of the site or surrounding properties;

(4) **Alteration** of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals; and

(5) The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this Section.

(6) Any area within the **vegetated buffer strip** will be returned to a natural state to the extent feasible.

(Boldfacing in original.) Section 10.1017.41 of the Zoning Ordinance makes clear that these criteria are mandatory and that all six must be satisfied in order for a wetlands conditional use permit to be issued. That section states:

The Planning Board shall grant a conditional use permit provided that it finds that all other restrictions of this Ordinance are

met and that proposed **development** meets all the criteria set forth in section 10.1017.50 or 10.1017.60, as applicable.¹

(Boldfacing in original; other emphasis added.)

10. The above-quoted sections of the Zoning Ordinance make clear that these criteria are not merely “factors” to be taken into consideration and to be weighed against one another in deciding whether to issue a permit, nor that an exceptionally strong showing of compliance with one of these criteria may be used to offset or excuse noncompliance with another. Four members of this Planning Board erred in so regarding them. There is no question but that the applicants’ pro-proposal fails to meet subsections (2) and (5) of section 10.1017.50: It would have been “feasible and reasonable” for the developers to erect a building and paved driveway within the site yet outside the 100’ wetlands buffer, § 10.1017.50(2), simply by reducing the size of the proposed building; and therefore the developers’ proposal is not the alternative with “the least adverse impact to” the wetlands buffer, the North Mill Pond, and its surroundings. Zoning Ordinance § 10.1017.50(5). Four members of this Board committed clear error by averring that these six criteria were nonbinding, “open to interpretation,” and the like, and by using such observations as a basis for granting site plan approval.

11. In addition to misinterpreting the criteria for the issuance of wetlands conditional use permits, the Planning Board also made other, unrelated errors in ultimately granting site plan approval. For one thing, that Board acted prematurely and committed error in refusing to wait until after the Historic District Commission had acted on the application that was before it, re-

1. Section 10.1017.60, mentioned in the quoted section above, is inapplicable here, inasmuch as it pertains to public and private utilities and rights-of-way in wetlands and wetlands buffers. There are no public or private utilities at issue here.

lating to the same project. The Planning Board should have waited to see what the developers' plan was going to look like after having been vetted by the HDC. More generally, there were many other unanswered questions which came to light during the December 16, 2021 hearing, and the Planning Board should have waited until they were resolved. For example, it was never settled who was going to be responsible for paying for valet parking in perpetuity and who was going to be responsible for enforcing the stipulation that such valet parking be provided, as the existing on-site parking provided-for by the developers' plan was and is admittedly inadequate.

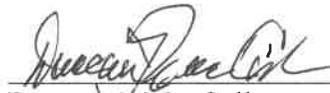
12. As part of his remarks in support of the project during the Board's deliberations, the chairman totally misquoted a member of the Conservation Law Foundation who had spoken before the Planning Board previously at its April 15, 2021 meeting, and he claimed that she had said that "this project [is] going to improve the quality of North Mill Pond water." In reality, she had said just the opposite. Attached hereto as Attachment C is a copy of a letter issued by the Conservation Law Foundation and dated December 23, 2021, in which the CLF, having learned what had transpired at the Planning Board's December 16, 2021 meeting, took issue with the chairman's misuse of its representative's words. While praising the developers' stormwater run-off treatment program, the CLF representative had condemned the project in general because of the intrusion into the wetlands buffer zone. (See Attachment C.)

13. Finally, the Planning Board erred in failing to adopt the recommendation of the Conservation Commission, which had disapproved the project in question. At the proceedings before the Planning Board, the developers boasted that they had worked closely with the Conservation Commission and that they had had five meetings with the latter in which they had modified their project in order to respond to the comments, criticisms, and feedback which the Commission had

given. Yet, after five meetings the Conservation Commission was still dissatisfied with the applicants' project and issued a negative recommendation concerning same. The Planning Board should have heeded the Conservation Commission's recommendation and denied site plan approval.

CONCLUSION

For all of the foregoing reasons, the Planning Board's decision of December 16, 2021 should be reversed, the conditional use permit should be rescinded, and this Zoning Board of Adjustment should enter a directive that the applicants' site plan is disapproved.



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Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Appellants in the within proceeding, hereby certifies that on this 14th day of January, 2022, true and correct copies of the foregoing Appeal of Decision of Portsmouth Planning Board were served upon the applicants both via e-mail and by forwarding same by first class mail, postage prepaid, to each of the following counsel of record:

Michael D. Ramsdell, Esquire
Brian J. Bouchard, Esquire
Sheehan Phinney Bass & Green, P.A.
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Duncan J. MacCallum

ATTACHMENT A



TND ENGINEERING

TRAFFIC, TND, TRANSPORTATION AND CONSULTING

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Mr. Robert P. Sullivan, Esq.
City Attorney, City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

December 1, 2021

Re: Planning Board Members

Dear Bob:

As we discussed recently in your office, and I briefly reviewed with Trevor by telephone last week, it has recently come to my attention that the current makeup of the Planning Board, which includes an ex-officio member appointed by the City Manager, is apparently not in conformance with the enabling statutes.

You asked that I reduce some of my thoughts about, and research into, this matter to writing and in compliance with that request, I offer this letter.

Beginning with the City's Code, Section 1.303 A contains the relevant City guidance:¹

Section 1.303: PLANNING BOARD

- A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically; (Adopted 1/23/95)
1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;
 2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;
 3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;
 4. Six residents of the City appointed by the Mayor with the approval of the City Council.
 5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council. (Adopted 1/23/95)

Figure 1: Section 1.303 of City Code

¹ Rather than retyping reference materials, I will use image-copy inserts in this letter to reduce the likelihood of typographical errors.

Based on a review of City Minutes, the previous City Manager appointed a City employee to an ex-officio position on the Planning Board in September, 2018. While not cited in the Council minutes, since it was an informational item only, I assume this appointment was in accordance with 1.303 A: 2, above.

While you obviously have all of the statutes readily at hand, to make this letter stand-alone in case you find yourself reviewing it away from your desk, the relevant statute is 673:2 (I grayed out the section not used in Portsmouth):

Appointment and Terms of Local Land Use Board Members

Section 673:2

673:2 Planning Board. –

I. (a) In cities, the planning board shall consist of 9 members:



(b) Alternatively, the local legislative body in a city with a city council-city manager form of government may establish a planning board with membership as provided in paragraph 1-a.

1-a. In cities with a city council-city manager form of government, the planning board may consist of the following 9 members:

(a) The city manager, or with the approval of the local legislative body the city manager's designee, who shall be an ex officio member;

(b) A member of the city council selected by the council, who shall be an ex officio member; and

(c) Seven persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

Figure 2: NH RSA 673:2

It is immediately apparent that while the current statute provides for only two ex-officio members on the Planning Board, the Manager and a Councilor, the City's Code adds another appointed by the Manager.

I have not researched the origin of 1.303 of the City's Code as I think that is not particularly relevant to our current discussion. In fact, I think it likely that 1.303 was in conformance with earlier statutes or at least accepted practices in or about 1980. My reason for this thinking is gleaned in part from the City of Concord's past history with this specific topic, and its Ordinance #1396, bearing a date of 7/14/80 that contains almost the same language as Portsmouth's Code's Section 1.303. Concord's Ordinance #1396, superseded more than once since 1980 follows on the next page.

CITY OF CONCORD

270
7/14/00

In the year of our Lord one thousand nine hundred and
AN ORDINANCE Amending Section 32.5 of the Administrative Code,
relative to Planning Boards.

The City of Concord ordains as follows:

Section One: Amend Section 32.5 of the Municipal Code of Ordinances,
Administrative Code, Planning Board by striking the whole thereof
and substituting in its place the following new section:

32.5 Planning Board. The Planning Board shall consist
of nine members, namely, the City Manager, one of the
administrative officials of the city who shall be select-
ed by the manager, and a member of the council who shall
be selected by it, as members ex officio, and six (6)
persons to be appointed by the Mayor, subject to con-
firmation by the City Council. The Mayor shall also
appoint, subject to confirmation by the City Council,
three (3) alternate members. Whenever a regular member
shall be absent the chairman shall designate an alternate
if an alternate is present to sit in the absent member's
place.

The Planning Board shall perform all functions provided
for by Chapter 56 of the New Hampshire Revised Statutes
as amended and be subject to all provisions of said
chapter.

Section Two: This ordinance shall take effect upon its passage.

Figure 3 City of Concord Ordinance #1396 from 1980

Concord revised its Ordinance #1396 in 1986, 2001 and again most recently
earlier this year with its current version being Ordinance No. 3084, that is
attached for reference.

Concord's current Ordinance tracks the current statutory provisions of RSA 673:2
by providing for two ex-officio members, and seven members appointed by the
Mayor and confirmed by the Council.

Like you, I am more focused on the statutory provisions than what other cities
may or may not have enacted, but I found Concord's example to be informative.²

I am of course more focused on the provisions of land use regulations
themselves than I am with enabling legislation, so when you were away on
vacation last week, I took the opportunity to review this topic with two private

² The Cities of Manchester and Rochester have provisions similar to Concord's but neither provides for a Manager appointment of
an ex-officio member.

attorneys I work with and also with the NH Municipal Association Counsel.³

In each instance, it was quickly apparent to these attorneys that Portsmouth's current Code is out of date and not in conformance with the current statutory scheme.

I would like to note with specific emphasis that my concerns are not in any way personal or related to the specific individuals currently or recently involved with this matter. My concerns are that this topic relates to the basic makeup of a Planning Board on which I serve myself and I strive to ensure compliance with pertinent requirements- I feel the City and the applicants before the Board deserve no less.

That thinking led me to consider the possible ramifications of not correcting what I believe was originally common practice but has now been revealed to be an outdated mistake that has only very recently been discovered by these discussions with you and others.

The Planning Board has many functions, but for this discussion we need to focus on its quasi-judicial functions, where interested parties are furnished notice, public hearings are held, and evidence is considered before a decision is reached. These quasi-judicial functions at least include the Board's review of subdivisions, site plans, and conditional use permits. These sorts of reviews occur very regularly, sometimes many times each month.

From my own review of this, it appears that at about the time of the enactment of Concord's Ordinance #1396, above, and possibly of Portsmouth's 1.303 (which may very well pre-date the Concord Ordinance), even the NH Supreme Court had a different opinion on the possible effects of one member's participation in a Board decision where that member may later be found to be disqualified.

In *Totty V. Grantham Planning Board*, 120 NH 390 (1980), the Court reviewed a case where two of the five voting members on a subdivision application were abutters, and the Court held that those two members were therefore disqualified. However, the Court also held that since the other three members voting in the unanimous Board decision were "concededly qualified" and that since there "was no indication" the disqualified members participation determined the outcome of the vote, the vote was held to be valid.

Just four years later the Court demonstrated that we all can make mistakes, in *Winslow v. Holderness Planning Board* 125 NH 262 (1984), the Court stated that with respect to *Totty* that "[w]e now believe this to be a misstatement of the

³ Mr. Natch Greyes, Esq.

law".⁴

In the *Winslow* case, the matter of a member's disqualification and the implications of a Planning Board member are discussed at some length. Noting that when Boards act in a quasi-judicial manner, the Court cited as relevant the NH Constitution which "demands" that all judges be "as impartial as the law of humanity will admit".

Under the current makeup of the Portsmouth Planning Board, one member (the "extra ex-officio member discussed above) is appointed by, and reports to another member who is that member's employer or supervisor (the Manager).

I think it impossible to contemplate and satisfactorily reconcile all of the possible problems such a situation can present under the current regulatory frameworks.

The pressure on the employee to agree with their employer/supervisor is one obvious possibility. However, what if -for example- the employee happens to speak first during deliberations, could that result in an undue influence on the Manager simply because of the employer/employee relationship that exists outside the Board?

The Court in *Winslow* also noted it would "reach the same result" in applying the test for members of zoning boards of adjustment to meet the standards required of jurors.

Here, and as you agreed in your office earlier this week, we have a situation where the City's Code does not conform with the current statute. I submit it also does not conform with current policy and best practices as enumerated in case law and followed by other cities. There can be no valid argument for allowing the manager or anyone else to appoint an "extra" ex-officio member without that falling into the realm of an ultra vires action.

I now turn to a sense of urgency in this matter as we have a Planning Board meeting scheduled for later this month. If I, the NH Municipal Association's counsel and others I have reviewed this matter with are all correct, then this "extra" member is not qualified as a Board member.

Finally, and again in the *Winslow* case, the NH Court stated (citing the *Rollins* Court) that "mere participation by one disqualified member was sufficient to invalidate the tribunal's decision because it was impossible to estimate the influence one member might have on his associates (emphasis added)".

⁴ This case also cites a much earlier case, *Rollins v. Connor* 74 NH 456 (1908) which also held that the participation in a "judicial action by a tribunal" by a disqualified member is voidable.

Again, please understand that this is not a matter focused on any individual person, but in a framework that has created a Planning Board membership scheme that does not conform to current Statutes.

If I am correct, then every quasi-judicial decision the Board reaches with such a member's participation runs the risk of being declared invalid. If I am incorrect, then the only risk is one less administrative official on the Board and the City's administrative officials have ample other opportunities to provide input to the planning processes in the City.

If you would care to discuss this further, I am at your service in that regard.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rick C. Hellman". The signature is fluid and cursive, with the first name "Rick" being the most prominent.

Chester "Rick" C Hellman, P.E., L.L.S.

Email only copies to:
Synthia Ravell (to print for Bob)
Trevor McCourt, Esq.

ATTACHMENT B

DUNCAN J. MACCALLUM
ATTORNEY AT LAW

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ALSO ADMITTED IN NY, PA, OHIO & MA

December 29, 2021

Dexter Legg, Chairman
Portsmouth Planning Board
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Re: Ineligibility of Raymond Pezzullo

Dear Mr. Legg:

This will constitute my formal request that Raymond Pezzullo be disqualified from sitting on the Planning Board at its upcoming December 30, 2021 meeting and that he in any event refrain from participating in the consideration of, or voting on, any of the applications that are to be entertained at that meeting.

The basis for my request is that Mr. Pezzullo is ineligible to sit on the Planning Board and was unlawfully appointed thereto, for in a city manager form of local government New Hampshire state law allows for the appointment of only two ex officio members to a planning board: the city manger (or his or her designee) and a member of the City Council. RSA 673:2. All other members of the planning board are to be appointed by the mayor and confirmed by the City Council. Id.

Mr. Pezzullo was neither designated by the city manager to sit on the Planning Board in her place nor chosen by the City Council to be its delegate to that Board (inasmuch as he is not a member of the City Council in the first place). Rather, he was purportedly appointed to the Planning Board as an additional ex officio member by the city manger, acting under color of section 1.303 of the City's Administrative Code. Section 1.303, however, clashes with the above-cited New Hampshire state statute and is therefore invalid. Ergo, Mr. Pezzullo is ineligible to sit on the Planning Board (or, at least, he is ineligible to sit as an ex officio member; he theoretically could still be appointed by the mayor and confirmed by the City Council), and he is presently holding his seat unlawfully.

You, of course, already have quite a bit of familiarity with this issue, inasmuch as it was publicly raised by Planning Board member Rick Chellman at the Planning Board's December 16,

2021 meeting and was the subject of some discussion between Mr. Chellman and yourself at that time. Further, at that meeting you also indicated that you were already aware of Mr. Chellman's letter of December 1, 2021 to City Attorney Bob Sullivan and that in fact you had already discussed it with the latter, even if you had not yet been provided with a copy. (In case you still have not received one, I enclose a copy of the letter herewith, as well as copies of its attachments.) To my knowledge, the December 16, 2021 meeting marked the first public disclosure of the fact that Mr. Pezzullo's eligibility to serve on the Planning Board was in question. But in any event, it seems clear that you yourself were already well aware of the issue.

As I'm also quite sure you're aware, the root of the reason why that issue has arisen is that there is a conflict between the relevant New Hampshire state statute, RSA 673:2, and one of the provisions of the City's Administrative Code, § 1.303. I deem it to be a proposition so obvious as to require no citation to legal authority, that if there is a conflict between a state statute and a local ordinance, the state statute prevails and the conflicting provisions of the local ordinance must yield.

RSA 673:2 establishes the framework for the planning board and prescribes the composition of its membership. In cities with a city manager form of government, there are to be nine regular members and, as already noted above, two of those members are to be ex officio members, consisting of (a) the city manager or his/her designee, and (b) a member of the City Council, chosen by the latter body. (There may also be alternates. See RSA 673:6.) The remaining seven regular members are to be appointed by the mayor and confirmed by the City Council. There is no provision in the statute for a third ex officio member.

RSA 673:2 states in pertinent part:

I. (a) In cities, the planning board shall consist of 9 members:

(1) The mayor of the city, or with the approval of the local legislative body the mayor's designee, who shall be an ex officio member;

(2) An administrative official of the city selected by the mayor, who shall be an ex officio member;

(3) A member of the city council selected by the council, who shall be an ex officio member; and

(4) Six persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

(b) Alternatively, the local legislative body in a city with a city council-city manager form of government may establish a planning board with membership as provided in paragraph I-a.

I-a. In cities with a city council-city manager form of government, the planning board may consist of the following 9 members:

(a) The city manager, or with the approval of the local legislative body the city manager's designee, who shall be an ex officio member;

(b) A member of the city council selected by the council, who shall be an ex officio member; and

(c) Seven persons appointed by the mayor, if the mayor is an elected official, or such other method of appointment or election as shall be provided for by the local legislative body or municipal charter.

In neither RSA 673:2, I nor I-a is there any provision for a third ex officio member on the planning board. The portion of the statute providing for the number of planning board members is expressed in the mandatory term "shall": "In cities, the planning board shall consist of 9 members[.]" RSA 673:2, I(a) (quoted above) (emphasis added). Subsection I-a(c) of the statute provides that by charter or by local legislative action, the municipality may alter the method of appointment of the non-ex officio members, but the subsection does not augment the total number of members who may be appointed, either regular or ex officio.

Section 1.303 of the Portsmouth Administrative Code is both internally inconsistent and in conflict with this statutory scheme, and therefore that section is void to the extent of the conflict. Section 1.303 provides:

A. Membership: The Planning Board of the City shall consist of nine (9) members and two (2) alternate members, specifically;

1. The City Manager, or the designee of the City Manager with the approval of the City Council, who shall be an ex-officio member;
2. An administrative official of the City selected by the City Manager who shall be an ex-officio member;
3. A member of the City Council selected by the Mayor with the approval of the Council, who shall be an ex-officio member;
4. Six residents of the City appointed by the Mayor with the approval of the City Council.
5. Two (2) alternates who shall be residents of the City appointed by the Mayor with the approval of the City Council.

B. Term: All Planning Board members shall serve as such without compensation and the appointed members shall hold no other municipal office except ward official, election official and check-list supervisors. The term of each appointed member shall be three (3) years. The Mayor shall apportion appointments so that no more than three appointments occur annually.

Section 1.303 unlawfully provides for a planning board which includes three ex officio members, rather than two, contrary to the statutory scheme laid out in RSA 673:2. It also reduces the number of citizen board members appointed by the mayor to six members, rather than seven. Conversely, it increases the number of members who may be appointed by the city manager (including herself) from one to two. It also purports to authorize the city manager to appoint a member who holds another municipal office other than ward official, election official, or check-list supervisor, contrary to Section 1.303's own provisions.

Finally, it throws the terms of office of ex officio members into a state of confusion. According to what Mr. Chellman says in his letter to City Attorney Sullivan--and I have no reason to doubt it--Mr. Pezzullo was appointed to the Planning Board as an ex officio member by then-City Manager John Bohenko, acting under color of the above-quoted section 1.303 of the Administrative Code. Was Mr. Pezzullo appointed to a three-year term? As an ex officio

Dexter Legg, Planning Board Chairman

December 29, 2021

Page 5

member, one would have expected his term of office to have expired with the expiration of the term of the official or other authority that appointed him, and former City Manager Bohenko retired two years ago. Was Mr. Pezzullo reappointed by our current city manager, Karen Conard, within these past two years since the time that she took office? If so, I doubt very much that he was confirmed by our current City Council, headed by Mayor Rick Becksted.

Absent some evidence that Mr. Pezzullo, an ex officio member, was reappointed by City Manager Conard and his reappointment confirmed by the City Council, it is clear that he is presently sitting on the Planning Board unlawfully, even under the terms of the City's own Administrative Code.

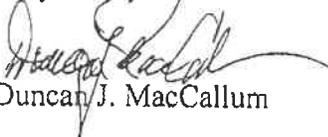
Finally, as Planning Board member Rick Chellman has ably pointed out in his letter of December 1, 2021 to City Attorney Bob Sullivan, the system laid out in section 1.303 of the Administrative Code, wherein the city manager appoints a Planning Board member selected from the City administrative staff, creates a situation of obvious conflict of interest on the part of the appointee (in this case Mr. Pezzullo). As a member of the city administration, the appointee is a city employee and thus is beholden to the city manager for his job; she has the power of hiring and firing over the former. The appointee is going to be loath to publicly express an opinion that is contrary to the opinion, stance, or wishes of the city manager, and he is not likely to vote against an application or measure that she supports. Almost invariably, he will vote in favor of whatever she votes for, and he will vote against whatever she votes against.

In practical effect, under this arrangement the city manager gets two votes: her own, and the vote of the ex officio member whom she has separately appointed from City administrative staff pursuant to section 1.303(A)(2). Any notion of independence of thought or action on the part of the appointee is a pipe dream, and in any event the arrangement does violence to the statutory scheme established by RSA 673:2, I and I-a.

Dexter Legg, Planning Board Chairman
December 29, 2021
Page 6

For all of the foregoing reasons, I ask that Mr. Pezzullo be disqualified from sitting as a Planning Board member at the upcoming December 30, 2021 meeting and at all future meetings.

Very truly yours



Duncan J. MacCallum

DJM/eap

Enclosures

cc. Robert P. Sullivan, Esquire (w/o enclosures)
Karen Conard, City Manager
Rick Becksted, Mayor
Rick Chellman (w/o enclosures)

HAND DELIVERED

ATTACHMENT C



For a thriving New England

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December 23, 2021

Chairman Dexter Legg and Planning Board Members
City of Portsmouth Planning Board
1 Junkins Avenue
Portsmouth NH 03801

Re: 1&31 Raynes Avenue Project, Conditional Use Permit Hearing

Dear Chairman Legg and Planning Board Members,

We write to you with concerns about comments made at the Planning Board meeting on December 16, 2021 in which the Board considered a conditional use permit (CUP) to allow the proposed 1&31 Raynes Avenue project to build within the 100 foot wetlands buffer. At that meeting, Chairman Legg referred to comments made by CLF's Great Bay-Piscataqua Waterkeeper, Melissa Paly, at an April 15, 2021 hearing on a different project as justification to support and approve a CUP.

At the April 15 hearing referenced by Chairman Legg, Ms. Paly provided comments regarding a project at 105 Bartlett Street, which was also seeking a variance from the 100-foot buffer. The first part of those comments commended elements of the project related to stormwater management that would enhance water quality in North Mill Pond. However, the second part of Ms. Paly's comments addressed the importance of buffers and concerns about reducing the 100-foot wetlands buffer.¹ During deliberations, several Planning Board members focused solely on the first part of Ms. Paly's comments related to stormwater management yet overlooked her concerns about encroachment on the wetland buffer.

¹ In her April 15 comments, Ms. Paly brought to the Board's attention a recent report called *Buffer Options on the Bay*, released by a consortium including the NH Department of Environmental Services, The Nature Conservancy, the Great Bay National Estuarine Research Reserve and others, that includes recommendations on buffer width to meet different objectives. Ms Paly stated:

One of the recommendations to really reduce runoff and stabilize banks is a minimum of 164 feet recommended in this report.... I'd like you to consider that a 100-foot buffer is a *minimum* to protect habitat, water quality and other things, so certainly granting a waiver will compromise the benefits that it's intended to produce.... There will be impacts as you chip away at that buffer.



At the December 16 hearing on the 1&31 Raynes Avenue project, Chairman Legg referred to Ms. Paly's April 15 comments, again focusing on her statements about stormwater management while ignoring those related to the importance of wetland buffers.² We want to clarify that (1) we have provided no public comment on the Raynes Avenue project, (2) any comments we provide on one project – which will always be based on site-specific characteristics – cannot fairly be invoked for, and applied to, *other* projects, and (3) the Chairman's comments ignored a critical element of the Waterkeeper's April 15 testimony about the dual importance of both stormwater management *and* buffers to improving water quality.

We respectfully request that any comments provided by CLF and/or its Waterkeeper program in one context not be applied to other projects for which they were not intended. Furthermore, we request that the Waterkeeper's comments be viewed fully rather than parsed to justify encroachments into critically important wetland buffers. Finally, we request that this letter be shared with both current and incoming members of the Planning Board who will, no doubt, continue deliberations on the Raynes Avenue project.

Sincerely,

/s/ Melissa Paly
Melissa Paly
Great Bay-Piscataqua Waterkeeper

/s/ Tom Irwin
Tom Irwin
CLF Vice President for New Hampshire

² <https://www.cityofportsmouth.com/planportsmouth/planning-board>
December 16, 2021 at 4:17

DUNCAN J. MACCALLUM

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ALSO ADMITTED IN NY, PA, OHIO & MA

January 14, 2022

Beverly Mesa Zendt, Planning Director
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Re: Raynes Avenue Project

Dear Ms. Zendt:

Enclosed for filing are the original and fifteen copies of our Motion for Rehearing/
Reconsideration.

Very truly yours


Duncan J. MacCallum

DJM/eap
Enclosures

HAND DELIVERED